STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(JUDGES SAAD, CAVANAGH, AND DONOFRIO)
AND THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN R. JACOBS,

Plaintiff-Appellee,

v

TECHNIDISC, INC., a Michigan corporation, and PRODUCER'S COLOR SERVICES, INC., a Michigan corporation,

Defendants-Appellees,

and
MICHIGAN MUTUAL INSURANCE COMPANY, n/k/a AMERISURE MUTUAL INSURANCE COMPANY,

Intervenor-Appellant.
_____/

S.C. NO.: 128715
(submitted with S.C. No. 128283)

C.A. NO.: 258271

L.C. NO.: 91-405664-NO

INTERVENOR-APPELLANT'S SECOND POST-ARGUMENT SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS

Following oral argument, the Court entered an order on May 12, 2006 directing the parties to file supplemental briefs addressing the likely practical consequences should the Court overrule *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1984). The Court's order also asks for discussion of the factors to be considered before overruling a prior decision as set forth in *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

What follows are the arguments of intervenor-appellant [Amerisure] in response to the Court's order. Amerisure notes that it has already filed one post-argument supplemental brief on May 10, 2006, with an accompanying motion, that relates to another issue.

ARGUMENT I

OVERRULING *SEWELL* RESOLVES, RATHER THAN CREATES, UNDUE HARDSHIPS AND REAL WORLD DISLOCATIONS, AS EXEMPLIFIED BY *REED* AND THE INSTANT CASE.

As a threshold matter, the Court may find it unnecessary to overrule *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1984) because, as the Director of the Workers' Compensation Agency points out in his post-argument supplemental brief, the Legislature post-*Sewell* amended the pertinent provision of the workers' compensation statute, MCL 418.841(1), on July 30, 1985. 1985 PA 103. Consequently, the Court could conclude *Sewell* ceased to have viability after the Legislature changed the statute upon which *Sewell* is based. Compare, *Sington v Chrysler Corp*, 467 Mich 144, 164; 648 NW2d 624 (2002); *Perez v Keeler Brass Co*, 461 Mich 602, 606; 608 NW2d 45 (2000). Amerisure notes the circuit court decisions in the instant case occurred after the legislative change in the statute.

Amerisure submits the Court should overrule *Sewell* nevertheless to avoid any argument that the legislative change did not affect *Sewell*'s viability. The Court should overrule *Sewell* for the reasons set forth in Amerisure's primary brief on appeal in this matter, see in particular pp 29-31 of that brief. Amerisure also concurs and adopts the position taken by the Director of the Workers' Compensation Agency as set forth in his post-argument supplemental brief. Amerisure adds the following regarding the practical consequences of overruling *Sewell*.

The practical consequences of overruling *Sewell* would be positive because overruling *Sewell* would resolve present undue hardships and real world dislocations, rather than create them. *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

The history of *Reed v Yackell*, 473 Mich 520; 703 NW2d 58 (2005) and the instant case serve as real world illustrations. With *Sewell* as the law, *Reed* was litigated for years, twice reaching this Court, only to conclude with the Court remanding the matter for transference to the Workers' Compensation Agency. That circuitous route was the result, in part, of confusion over whether circuit courts can resolve "employee" questions under the provisions of the Worker's Disability Compensation Act as part of an action initiated in circuit court. Overruling *Sewell* with a clear pronouncement that these issues belong exclusively to the Workers' Compensation Agency eliminates that uncertainty and duplication of litigation. Similarly in the instant case, the circuit court's erroneous assumption of jurisdiction over the weekly compensation rate question and its duration displaces the Workers' Compensation Agency's exclusive authority to resolve those same issues. And, the circuit court's orders in this case, if left uncorrected, create the situation where plaintiff will be overpaid every week thereby necessitating weekly recoupment to Amerisure through litigation before the Workers' Compensation Agency. (See Argument II in Amerisure's primary brief, pp 32-36). Payment of workers' compensation was designed to be as efficient and straightforward as reasonably can be, not unnecessarily convoluted due to an erroneous idea that its jurisdiction is shared.

The inevitable argument of the opposition in this matter is that circuit court cases ought to proceed without the necessity of referring issues inherent in that litigation to the Workers' Compensation Agency. Besides what has been argued already in the consolidated cases, Amerisure notes a strong parallel with similar concerns in primary jurisdiction cases. Therefore, how matters are handled in primary jurisdiction is relevant.

Primary jurisdiction is similar to the subject matter jurisdiction issues here in the sense that primary jurisdiction applies "where an administrative agency possesses expertise

concerning specific claims over which it has authority and jurisdiction." *Travelers Insurance Co v Detroit Edison Co*, 465 Mich 185, 203; 631 NW2d 733 (2001).

In the primary jurisdiction area, no undue hardship, real world dislocation, or impracticality appears to have occurred as a result of courts referring issues to administrative agencies for resolution of questions within the agency's ambit. Rather than creating problems, such a procedure is viewed as "recognition of the need for orderly and sensible coordination of the work of agency and of courts." *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 424 Mich 65, 70; 559 NW2d 647 (1997). To proceed in such a manner is to observe the proper distribution of power. Thus, the United States Supreme Court has not hesitated to "suspend" or "stay" judicial proceedings so as to "refer[]" issues to the appropriate administrative agency for that agency to exercise its rightful function. This Court has noted:

> In [*United States v*] *Western Pacific* [*R Co*, 352 US 59; 77 S Ct 161; 1 L Ed 2d 126 (1956)] at 64, the United States Supreme Court made clear that "in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." More recently, the same Court has described the effect of the doctrine as requiring "the [trial court] to . . . stay[] further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v Cooper*, 507 US 258, 268; 113 S Ct 1213; 122 L Ed 2d 604 (1993). Thus, the Court explained "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Id.* at 268-269 [emphasis omitted]. *Travelers Insurance Co*, 465 Mich at 206-207.

See also, *San Diego Building Trades Council v Garmon*, 359 US 236, 245; 79 S Ct 773; 3 L Ed 2d 775 (1959) ["When an activity is *arguably* subject to (sections) of the (National Labor Relations Act), the States as well as the federal courts must defer to the exclusive competence of

the" administrative agency. (Parenthetical material and emphasis added)]; *Anderson v Chicago M & St P R Co*, 208 Mich 424, 429; 175 NW 246 (1919) ["the questions . . . involved are administrative in character such as to preclude the state court from inquiring into and adjudicating them without application having been *first* made to the commission." (Emphasis added).].

Therefore, there is nothing unique in suspending or staying a judicial proceeding and referring to an administrative agency those questions arising under that agency's statute. It is but "'another form of judicial restraint ... [that] will defer to that special expertise....'" *Travelers Insurance Co*, 465 Mich at 210. It reflects "the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency." *Travelers Insurance Co*, 465 Mich at 199. See also, *City of Taylor v Detroit Edison Co*, 475 Mich 109; ____ NW2d ____ (2006).

No undue hardships or real world dislocations have appeared to result from the above distribution of power in the context of primary jurisdiction. There is no reason to believe it would occur in the context of subject matter jurisdiction.

ARGUMENT II

EVEN IF THE COURT DOES NOT OVERRULE *SEWELL*, THE RATE AND ENTITLEMENT QUESTIONS IN THE INSTANT CASE ARE RESERVED EXCLUSIVELY FOR THE WORKERS' COMPENSATION AGENCY.

Even if *Sewell* is not overruled or if it is overruled only prospectively, the circuit court in the instant case had no subject matter jurisdiction, under *Sewell*'s own reasoning, to set a weekly compensation rate and set its duration for the reasons set forth in Amerisure's primary brief, p 29, filed January 17, 2006.

RELIEF

WHEREFORE, intervenor-appellant, Michigan Mutual Insurance Company, n/k/a Amerisure Mutual Insurance Company, reiterates the relief requested in its primary brief, filed January 17, 2006, in its first post-argument supplemental brief, filed May 10, 2006, and asks the Court to overrule *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1984).

Respectfully submitted,

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